BRIEF FOR PETITIONER.

Petitioner submits that the judgments in its favor in the prior suits, one against the United States and the other against the Collector for the immediately adjoining day to the first day here involved are or at least one of them is res judicata of the question here, in view of the finding that petitioner's purposes and activities for the period involved in this suit and the period involved in the former suits were the same.

The consequences of upholding the decision below will be to open the road to endless and repeated litigation not only of all club tax cases but of other tax cases involving similar questions such as the question whether a corporation is charitable and thus exempt under the income and social security tax laws. It means res judicata is a non existent doctrine in this field. For example the case of the Washington Cosmos Club cited in the petition and every other club can be relitigated every time it makes a tax payment. Also petitioner can go back to the District Court and sue the United States again and again or sue the Collector and have Jury trials.

In his concurring opinion in the case at bar Judge Whittaker said (R. 19-20):

> "I think the decision of the District Court for the Eastern District of Pennsylvania, holding that this taxpayer was not a social club, is res judicata in this proceeding and precludes us from inquiring whether or not it was in fact a social club. I think we are required to so hold by the decision of the Supreme Court in Tait *v.* Western Maryland Railway Company, 289 U. S. 620, 623. The testimony in this case is uncontradicted that the purposes and activities of the club in the year now before us were the same as in the year before the

> District Court. This being true, the judgment in the former proceeding, that the plaintiff was not a social club, is conclusive here. Tait *v.* Western Maryland Railway Co., supra, so holds."

Also the holding of the majority of the court below on the res judicata point conflicts with the view of the Board of Tax Appeals. See *Mallery*, 42 B. T. A. 793.

Furthermore, the holding of the majority of the court below on res judicata cannot be reconciled with the following fundamental principles of res judicata doctrine. According to 30 American Jurisprudence, sec. 165, page 910, it rests on the rule that:

> "Public policy and the interest of litigants alike require that there be an end of litigation which without the doctrine of res judicata would be endless."

Again in the same volume, at section 178 (citing many decisions of this Court) it is said:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined are conclusively settled by the judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies regardless of the form the issue may take in the subsequent action whether the subsequent action involves the same or a different form of proceeding or whether the second action is upon the same or a different cause of action, subject matter, claim or demand, as the earlier action."

In the case at bar and in the former cases in which the judgment relied on as res judicata was rendered the statute and regulations applicable, the purposes and activities of the petitioner and the issue were all the same.

The case boils down to the fact that the Court of Claims undertook to overrule the District Court and also paid no attention whatever to the principle of adherence to precedent, which this Court in *Radio Corp.* v. *Radio Laboratories*, 293 U. S. 1, at page 8, declared might bring one not a party to a prior suit out at the same place as the doctrine of res judicata if "there is substantial identity of the evidence".

The Court of Claims also held the judgment in the suit against the Collector was not res judicata in a suit against the United States. That question is now under consideration here but even if the Court of Claims was right one of the judgments relied on here was rendered in a suit against the United States and to that res judicata clearly applies.

The Court of Claims in its opinion said:

> "We are asked, then, to close our eyes and minds then to the facts actually before us, and to give to plaintiff a judgment which we would not give to any other plaintiff whose cause of action had equal merit. * * * The doctrine of res judicata should not be so extended."

In the first place that is exactly what the doctrine is. See *United States* v. *Moser*, 266 U. S. 236. It applies to tax cases the same as to other cases. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623, and does not depend on whether the judgment invoked is right or wrong.

The Social Club Question.

Since the dues tax was enacted in 1917 the definition in the various regulations of a social club has been the same. For it see appendix, page 12.

During that time Congress repeatedly reenacted the provision without change and thus made the regulation part

of the law under familiar doctrine. *Helvering* v. *Winmill*, 305 U. S. 79 and cases cited at page 83.

As said in *Bankers Club* v. *United States*, 37 F. (2d) 982:

> "It is true the club's furnishings are elaborate and expensive, its quarters inviting and especially designed for its intended purpose, its resources great, its income large and its membership totals in excess of 2,200. * * * Neither the taxing act nor the regulations of the Bureau discriminate between an imposing organization and one less ornate and attractive. The issue is the purpose of the club, and, if it falls within the class specifically pointed out by the Act and the regulations as exempt from taxation, we cannot refuse to so hold, especially so when there exists no proof of any probative worth to the contrary."

In the case at bar the test for membership instead of being social is professional as in a bar or medical association.

Moreover, Article 25, Regulations 43 states:

> "When a club or organization has been held not to be a social, athletic or sporting club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created."

In the case at bar the finding of fact is that petitioner did not change its activities or its purpose. (Finding 11, R. 14.) Consequently this regulation applies.

The Commissioner did not reject this claim because he held petitioner was a social club solely because it failed to file powers of attorney from its members. (Finding 9, R. 11.)

On the same day the claim was rejected petitioner filed this suit in the Court of Claims which court in *Builders Club of Chicago,* 14 F. Supp. 1020, had held the regulation requiring powers of attorney from members invalid. The government did not seek review of that decision.

Three months later and after issue was joined in this suit the Commissioner, obviously at the prompting of his counsel, issued a further letter purporting to reject the claim (not then before him) on the ground petitioner was a social club.

For the foregoing reasons the writ should be granted and the decision below reversed.

All of which is respectfully submitted.

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